

Exhibit 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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LYDIA GRUBER : No. 3:14cv-1828 (SRU)
 : 915 Lafayette Boulevard
 vs. : Bridgeport, Connecticut
 :
 : April 7, 2015
 STARION ENERGY, INC. :

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MOTION HEARING

B E F O R E:

THE HONORABLE STEFAN R. UNDERHILL, U. S. D. J.

A P P E A R A N C E S:

FOR THE PLAINTIFF:

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1 11:00 o'clock A. M.)

2 THE COURT: Good morning. We're here in Gruber
3 v. Starion Energy. Could I have appearances, please?

4 MR. IZARD: Robert Izard for the plaintiff, Your
5 Honor.

6 THE COURT: Thank you.

7 MR. SMITH: Keith Smith, Eckert Seamans Cherin &
8 Mellott for the defendant, Starion Energy, Inc.

9 THE COURT: Thank you.

10 MS. ISAAC: Hi. Alexdria Isaac, General Counsel
11 for Starion Energy.

12 THE COURT: Very good, thank you. And we're
13 here on the motion to dismiss.

14 Let me just take up a side matter first. We
15 have the motion to certify the class and to stay briefing.
16 This is Document Number Seven. My understanding is that
17 was filed as a protective matter, and as I've indicated in
18 writing in other cases and orally in another similar case
19 to this one, I don't believe that the 7th Circuit is
20 correct in the need for a protective motion for class
21 certification. So, I'd be inclined to deny that motion
22 without prejudice to later filing.

23 Any objection?

24 MR. IZARD: No objection, Your Honor.

25 THE COURT: All right, that's what we'll do.

1 Okay. So let's take up the motion to dismiss.
2 Mr. Smith, let me just comment that much of the opposition
3 here is seemingly based almost more on a motion for
4 summary judgment than a motion to dismiss. It doesn't
5 appear to me that you're accepting the well-pleaded
6 allegations of the complaint. You're, in effect, arguing
7 the merits and I just don't think I can consider a number
8 of the matters that you've introduced.

9 So, I don't know if you disagree with that or if
10 you think there's some reason why you think I can, but
11 that's a concern right upfront.

12 MR. SMITH: Shall I approach the podium?

13 THE COURT: Wherever you're comfortable is fine.

14 MR. SMITH: Your Honor, the defense has two
15 documents they want to hand up; one which is Exhibit A to
16 our motion, which is the contract at issue in terms of
17 service to Ms. Gruber, and the second one is --

18 THE COURT: This one?

19 MR. SMITH: Yes.

20 THE COURT: I've got that.

21 MR. SMITH: And we'd like to have it separate
22 from the pack.

23 THE COURT: Right, I agree.

24 MR. SMITH: And second are the Table One and
25 Chart One of the reply brief.

1 THE COURT: Fair enough.

2 MR. SMITH: And the plaintiff has two documents.

3 Do you want to represent them --

4 MR. IZARD: Sure.

5 Yes, Your Honor, the first is a copy of the
6 chart from the complaint, and then the second is what
7 we've done is we've plotted the chart that the defendant
8 introduced with their lowest variable rate and the highest
9 variable rate. The lowest is the blue line and the
10 highest is the red line, and we plotted the plaintiff's
11 rate from table one of the defendant's reply brief.

12 THE COURT: All right.

13 MR. SMITH: Your Honor, plaintiffs have filed
14 what amounts to virtually four complaints in a variety of
15 matters against a variety of energy companies. Each
16 allege the same thing, that the energy companies were
17 gouging their clients by overcharging them on variable
18 rate policies, which in and of itself begs the question of
19 how all those companies could be doing that and that's not
20 being a market for the price of electricity.

21 But what's different in each case is the
22 contract itself. And, in particular, with regard to
23 Starion, the contract doesn't say anything about wholesale
24 market rate, wholesale market conditions, anything about
25 wholesale price. The contract and the complaint, by the

1 way, Your Honor, references the wrong terms of service.

2 In doing the formal complaint, they pulled the
3 terms of service apparently off the internet, which didn't
4 exist at the time that Ms. Gruber signed up with us and
5 the time that she canceled, so the terms of service
6 doesn't apply to Ms. Gruber. The terms of service that
7 does is the one attached to Exhibit A to the motion to
8 dismiss.

9 THE COURT: No, Exhibit B-2, standard
10 electricity contract, does use the phrase "wholesale power
11 market."

12 MR. SMITH: That was not the one for Ms. Gruber.
13 That's when we very first applied for our license, which
14 we attached to show that the state does get these
15 agreements and have to, you know, approve them -- when
16 they approve the license, they approve the agreement and
17 every time we change the agreement, we have to submit the
18 statement with the annual filing. So they're -- even
19 though it's a deregulated energy market, it's not without
20 regulation; in fact, it's heavily regulated. In terms of
21 the practices of the individual companies, it's heavily
22 regulated.

23 But as to Starion's contract with Ms. Gruber,
24 the sole language as it relates to the variable rates and
25 how that affects price is that a variable rate will be

1 calculated monthly based upon Starion's variable price
2 methodology. That's it. Nothing about any other terms or
3 conditions of what that variable price methodology is made
4 up of.

5 THE COURT: So, if the methodology is we can
6 double our profit every month, then the customer's stuck
7 except for canceling the contract.

8 MR. SMITH: Well, it's a month to month
9 contract. Essentially you can cancel at any time.

10 THE COURT: Right, so if you don't like the
11 profit every month, that's your methodology. If the
12 customer doesn't like it, they just back out.

13 MR. SMITH: And we make it very easy for them
14 because the following sentence is, "You should contact
15 Starion by telephone at 1-800 or by email at Service at
16 Starion Energy for your most current rate information."

17 THE COURT: Right.

18 MR. SMITH: So we tell them, look, you want to
19 know what's the current information, call, email us. You
20 can also go on PURA's website and get, not only our rate
21 information, the rate information of all our competitors
22 but all the current offerings of all of our competitors at
23 the same time. That's what an informed consumer would do.

24 And then we specifically go on to say that the
25 price of your LDU, which would be Connecticut Light and

1 Power, standard offer service electricity rate will also
2 likely change from time to time, and therefore, Starion
3 cannot guarantee savings over the LU's rate under this
4 agreement.

5 We tell the consumer, we can't guarantee we're
6 going to save you money over what you can get from your
7 regular utility.

8 THE COURT: Right, because they have a fixed
9 right and your rate varies with the cost of electricity.

10 MR. SMITH: They have a fixed rate with a
11 guarantee of no loss. They can't lose money --

12 THE COURT: I'm focusing on yours, right?

13 MR. SMITH: Yes.

14 THE COURT: So yours is, the hope for the
15 consumer is you can either pick this rate at which the
16 provider will not lose money or you can take a gamble on
17 the market and hope that the wholesale price goes down and
18 go with us and get a variable rate, right?

19 MR. SMITH: Correct, Your Honor.

20 THE COURT: But if the rate never goes down --

21 MR. SMITH: But that theory don't apply to Ms.
22 Gruber, because if --

23 THE COURT: Does it apply to the class?

24 MR. SMITH: Well, Ms. Gruber has to have a
25 complaint that stands on her own. For purposes of the

1 motion to dismiss, we're not dealing with class
2 certification right now, but for purposes of the motion to
3 dismiss, Ms. Gruber must have --

4 THE COURT: Okay.

5 MR. SMITH: -- if you look at table one --

6 THE COURT: Table one is not in the complaint.

7 MR. SMITH: Table one is based on the data that
8 they rely upon at this point.

9 THE COURT: No, no, no. What you're doing now
10 is you're introducing new -- this is the point I made at
11 the beginning, this is a great chart for a summary
12 judgment motion, but how is it a great chart for a motion
13 to dismiss? At the motion to dismiss, I look at the
14 complaint and decide whether it states a cause of action
15 or not.

16 MR. SMITH: Or what they rely upon in the
17 complaint, and what they rely upon in the complaint, what
18 they represent to the Court in the complaint as a
19 wholesale market rate is --

20 THE COURT: Did they rely upon this chart in the
21 complaint?

22 MR. SMITH: They relied upon the ISO New England
23 all hours LMP price, day ahead, all hours, average LMP
24 price, which they break down to the kilowatt hour.

25 THE COURT: Okay.

1 MR. SMITH: That is what they rely upon.

2 THE COURT: Okay.

3 MR. SMITH: So, the reasonable extension of that
4 is, what the rest of that document they rely upon says and
5 the rest of that document that they rely upon talks about
6 off peak/on peak hours and rates, and the day ahead hourly
7 rate --

8 THE COURT: Does that document have Gruber rates
9 during open account with Starion? Or are you -- you're
10 extrapolating, you're coming in and you're taking a
11 document that is referenced in the complaint and you're
12 creating another document based upon the document that's
13 mentioned in the complaint.

14 MR. SMITH: No, no.

15 THE COURT: No?

16 MR. SMITH: I apologize, Your Honor. The last
17 two columns, Ms. Gruber's rate, are based upon her bills.

18 THE COURT: Are her bills in the complaint?

19 MR. SMITH: No, but she's -- her, the basis of
20 her entire complaint is we overbilled her.

21 THE COURT: Okay. This would be a great
22 argument at summary judgment.

23 MR. SMITH: See, I don't believe that, Your
24 Honor. I believe Your Honor is free to accept the bills
25 because the complaint relies on the bills. If not for the

1 bills, we could not have overcharged her or overbilled
2 her.

3 THE COURT: Okay. Where is there any mention of
4 bills in the complaint? It's talking about overcharges.

5 What you're doing is you're saying they are
6 going to lose eventually. That may be true. They may
7 well lose this case. When you come in with evidence and
8 there's depositions and you've got your experts and
9 everything else, they may lose. That's not what I'm
10 deciding today.

11 MR. SMITH: I understand that, Your Honor. But
12 Your Honor's free to accept the -- if we overcharged her,
13 we did so by billing her and having her paying too much
14 money.

15 THE COURT: So you have an affidavit that says
16 we didn't overcharge her so much money, and it's a
17 wonderful summary judgment document.

18 MR. SMITH: It's not an affidavit that we didn't
19 charge her too much money; it's, you know, she is relying
20 upon what we charged her. The basis of her complaint is
21 we overcharged her and, therefore, she's relying upon what
22 we charged her. Yet, they don't tell the Court what we
23 charged her. They tell the Court we had this high rate of
24 .219 for some period of time, but that was never
25 overcharged --

1 THE COURT: If I have an employment case and the
2 allegations are my boss called me racially discriminatory
3 names and they don't say that the boss also said wonderful
4 things about them, do I consider those wonderful things on
5 the motion to dismiss? No. They are not in the
6 complaint.

7 You don't, you don't get to bring in whatever
8 documents you want that relate to the subject matter of
9 the claim. I have to look at the complaint.

10 MR. SMITH: It's not such relating to the
11 subject matter, Your Honor. It's the heart and soul of
12 her complaint is that we overbilled her.

13 THE COURT: The heart and soul of her complaint
14 is that it's an unfair trade practice to intimate, if not
15 represent, that you're going to vary your rates with the
16 wholesale cost of electricity and then not to do that.

17 Now, that can be true or not for the class,
18 regardless of what Ms. Gruber was charged in October of
19 2013.

20 MR. SMITH: How can Ms. Gruber have standing to
21 make that claim unless she was herself overbilled?

22 THE COURT: No, the claim is that her rate did
23 not vary as it was supposed to vary. Now, if you can show
24 that with this chart, I'm going to be surprised.

25 MR. SMITH: Well, I can -- part of that claim is

1 that the price went up and never went down. I can prove
2 that from this chart.

3 THE COURT: Okay.

4 MR. SMITH: All right? If you look at the rates
5 that they do rely upon, those rates kept going up and up
6 and up. Ms. Gruber quit, canceled the contract in January
7 of 2013.

8 THE COURT: Right.

9 MR. SMITH: She didn't stay around long enough
10 for her rates to ever go down. So, even looking at the
11 day at all hours, average LMD rate, which, by the way, is
12 never a rate that anyone has ever paid, it is not an
13 actual rate. It's not even an weighted average rate. But
14 the rates kept going up, up, up --

15 THE COURT: So you're saying that had she
16 remained a customer, her rate could have gone down but it,
17 in fact, didn't go down.

18 MR. SMITH: It couldn't have because she didn't
19 remain a customer.

20 THE COURT: Okay. How does that help you? If
21 you're saying -- on the one hand, you're trying to tie it
22 back to Gruber and what her situation was; on the other
23 you're saying, well, her situation was affected by the
24 fact that she withdrew.

25 MR. SMITH: Correct.

1 THE COURT: Okay. So --

2 MR. SMITH: She can't have a claim that's based
3 on a theory that the rate went up and never went down,
4 because the rate should have gone down during the period
5 of time she was our customer. The rate only went up, even
6 -- your theory is it's not the wholesale rate, which our
7 contract doesn't say anything about. But the wholesale
8 rate that they talk about is going up for the few months
9 that she was our customer.

10 THE COURT: Okay.

11 MR. SMITH: And she canceled.

12 THE COURT: Okay.

13 MR. SMITH: So, you know, her rate went up, the
14 wholesale rate went up, they didn't go down, so how could
15 that theory that it went up and never went down apply to
16 Ms. Gruber? It can't.

17 THE COURT: Okay. So they need another
18 plaintiff.

19 MR. SMITH: Possibly, if they can find another
20 plaintiff. But this plaintiff, I have to look at the
21 complaint and I have to look at this plaintiff.

22 THE COURT: Right.

23 MR. SMITH: I can't deal with class
24 certification issues just yet, but this plaintiff --

25 THE COURT: So what you're saying is, again, at

1 summary judgment you'd be able to come in and show that
2 the allegations of the complaint are false. That's what
3 you're saying.

4 MR. SMITH: I believe I can show that now, and I
5 believe Your Honor --

6 THE COURT: Right.

7 MR. SMITH: -- can accept that.

8 THE COURT: How can I accept that on a motion to
9 dismiss? The classic formulation of a motion to dismiss
10 is treating all of the allegations of the complaint as
11 true, drawing all reasonable inferences in favor of the
12 plaintiff, have the plaintiff state a cause of action.

13 MR. SMITH: Yes, but Your Honor is allowed to
14 accept -- for example, the contract, its terms of service
15 are attached. Your Honor is allowed to accept the
16 contract in a motion to dismiss.

17 THE COURT: Correct.

18 MR. SMITH: Because the complaint relies upon
19 it.

20 THE COURT: That is correct.

21 MR. SMITH: And I believe that the complaint
22 relies upon the bills that were charged. The complaint
23 relies upon the charges to her and that can't be without
24 bills to her. So for the same reason that the Court can
25 accept the contract --

1 THE COURT: There's no reference anywhere in the
2 complaint about the bills, so what you're saying is we
3 will be able to prove that the allegations of the
4 complaint are false. That is true of 80 or 90 percent of
5 the complaints that are brought here. The defense
6 believes they can disprove the merits of the claim at the
7 appropriate time, and I understand that is your position.
8 But the fact that you think you can disprove the merits of
9 the claim doesn't mean the claim doesn't get past the
10 motion to dismiss.

11 MR. SMITH: If I may --

12 THE COURT: Take your time.

13 (Pause)

14 MR. SMITH: In that case, Your Honor, I move to
15 dismiss because the complaint doesn't say anything about
16 how Ms. Gruber was deceived or how this deception
17 allegedly applied to her. It just talks in
18 generalizations about the class, it talks in
19 generalizations about Starion's highest rate. They don't
20 actually tell the Court that in that same chart that we're
21 required to give to the state, and it's on our website,
22 it's on the state's website, it is also our lowest
23 variable rate.

24 THE COURT: Right. So you want them to plead
25 the evidence that's favorable to your client, and they can

1 choose to do that or they can choose not to do that.

2 MR. SMITH: No, I'm arguing there's no facts
3 pled that Ms. Gruber was actually deceived. The facts are
4 all generalized as to what, you know, a class might have
5 been deceived. There is nothing as to Ms. Gruber.
6 There's nothing to say that Ms. Gruber was promised this
7 rate and was charged, you know, another. There's nothing
8 to say that Ms. Gruber's rates were higher or lower than
9 the wholesale market rate that they want to rely upon, the
10 Starion contract, what the Starion contract says as to its
11 variable rate methodology.

12 There's nothing specific about Ms. Gruber's
13 charges and Ms. Gruber's rates and Ms. Gruber's bills to
14 support a claim that Ms. Gruber herself was in any way
15 deceived under a Connecticut Unfair Trade Practices or
16 that we violated a contract, our obligations of good faith
17 and fair dealing or unjust enrichment, because, as Your
18 Honor just pointed out, there's no actual facts as to what
19 happened to Ms. Gruber and what charges she was subjected
20 to -- what, you know, onerous, deceptive information she
21 was subjected to.

22 So, at the very least, I would ask for -- that
23 the plaintiff be forced to amend the complaint to provide
24 a more definitive statement as to how it is Ms. Gruber was
25 actually deceived by any of this.

1 But getting back to the contract, our contract
2 just says a variable rate will be calculated monthly based
3 on a Starion variable price methodology.

4 THE COURT: Right.

5 MR. SMITH: What about that would cause Ms.
6 Gruber or anyone else to say that there's some wholesale
7 rate that I can go out and try and find and that that's
8 what Starion means by variable price methodology.

9 There's nothing, there's no representation that
10 was ever made to Ms. Gruber other than that contract, and
11 that contract doesn't represent that our rates are tied to
12 anything. That contract says, you know, you can call and
13 find out what our rate is.

14 THE COURT: We can do whatever we want. Our
15 methodology --

16 MR. SMITH: It's not whatever we want, Your
17 Honor. That implies that we can just charge ten dollars a
18 kilowatt hour. We're not saying that, no one's saying
19 that. We're saying that we have a variable rate that is
20 adjusted. We're not saying -- it doesn't say how it
21 adjusts. We're not deceiving you. The question is did we
22 deceive her. We didn't deceive her, we didn't say it's
23 going to adjust this way.

24 THE COURT: The question is whether a reasonable
25 consumer, reading this language, would understand that if

1 the cost of electricity to the supplier goes down, then
2 the charge by the supplier would also go down.

3 MR. SMITH: And I understand --

4 THE COURT: I think that's a reasonable reading
5 of this language.

6 MR. SMITH: I don't think that's a reasonable
7 reading of our language. That may be a reasonable reading
8 of some of the other defendant's language in some of the
9 other cases, but this doesn't say anything about, that
10 it's based on what our cost of electricity is or what
11 the --

12 THE COURT: So, you have no obligation under
13 this contract to any consumer to do anything other than
14 set forth what your price is and allow them to look at it
15 every month on the website.

16 MR. SMITH: Our contractual -- that is our
17 contractual obligation, Your Honor, yes.

18 THE COURT: Right. So your contractual
19 obligation is we will charge you something and you can
20 look it up. That's the, that's the contract?

21 MR. SMITH: Yes, Your Honor. I mean --

22 THE COURT: Okay, fine.

23 MR. SMITH: -- and that was the contract at
24 issue in the Slack v. Suburban Propane case, in more far
25 more egregious circumstances, where the person, the driver

1 showed up to fill your propane tank and wouldn't tell you
2 what the price is --

3 THE COURT: Right.

4 MR. SMITH: -- but you could call and they would
5 tell you that.

6 THE COURT: I think maybe I disagree with the
7 reasoning in that case.

8 MR. SMITH: All right. You may disagree with
9 the reasoning of the case, but that case had a contract
10 that specifically --

11 THE COURT: After we fill your tank, we'll tell
12 you what we're going to charge you.

13 MR. SMITH: Fairly egregious circumstances.
14 We're not doing that here.

15 THE COURT: Well, you kind of are. You're
16 saying you can look it up, but there's no clue, according
17 to you, there's no clue what the rate will be, it's just
18 whatever we haven't published. So, you know, next month
19 it could be whatever our variable price methodology,
20 whatever that might mean, is.

21 MR. SMITH: But the question before the Court
22 is, how can a reasonable consumer read that language, a
23 variable rate calculated monthly based on Starion's
24 variable price methodology, to be tied to a specific
25 factor.

1 THE COURT: Well, when something varies, there's
2 two ways you can vary. You can vary by being connected to
3 something else. You can have a mortgage rate that is tied
4 and varies with the prime rate, for example.

5 MR. SMITH: All right.

6 THE COURT: And the allegation here is that the
7 logical understanding is that this rate varies with the
8 wholesale price and/or the price of electricity to the
9 supplier. Doesn't have to vary. It can vary completely
10 randomly which is apparently what your argument is this
11 language means. It varies -- next month we decide to
12 increase it, maybe we'll decide to decrease it; it's just
13 whatever we decide to do.

14 MR. SMITH: Well, you have to take that in
15 context with the following sentence, which explains how
16 you can find out what our current offerings are.

17 THE COURT: You can find out what it is but you
18 can't find out, according to this language, how you decide
19 what it is, because you're telling me that the first
20 sentence is not binding on you. You can do whatever you
21 want.

22 And so next month it's three times as high as it
23 was last month. You can look it up online. Next month it
24 might be a little lower. You can look it up online. But
25 you can't look up online apparently how the heck you

1 figured that out or what you're basing it on. Right?

2 MR. SMITH: I refer Your Honor to the charts
3 that plaintiffs have submitted.

4 THE COURT: Right.

5 MR. SMITH: This chart shows the highest rate
6 that Starion charges --

7 THE COURT: Okay.

8 MR. SMITH: -- of any variable rate customer,
9 and also the lowest rate that Starion charges of any
10 variable rate customer.

11 Plaintiffs have added in Ms. Gruber's rates at
12 the relevant period when she was our customer. She's
13 between these two. At any point in time she could have
14 gone online and said, all right, once she was online and
15 found out what the rate was, the current offering that she
16 could sign up for, or she could have seen that, at the
17 very least, there is somebody in the state paying the
18 highest rate. Could only be one person, I don't know, but
19 there's somebody paying that.

20 So, a reasonable consumer is looking at that and
21 she's gambling and she's making the determination for her
22 that she's willing to take a variable rate policy, but
23 this tells her she could be charged as much as -- the
24 numbers aren't on here but, you know, it's something like
25 18 cents or so during the relevant period.

1 THE COURT: I don't understand how the fact that
2 you're charging somebody else something more than Gruber
3 eliminates her claim. Her claim is based on this chart,
4 this other chart, which shows Starion's average price
5 compared to average wholesale price.

6 Her argument is the green line should have some
7 connection to, some relationship to the orange line.
8 That's her argument.

9 MR. SMITH: But the question is how could we
10 have deceived her as to what her rate could go up to if
11 her rate never even went up to, by their own chart, what
12 her highest rate was.

13 THE COURT: I don't think she's -- maybe I'm
14 wrong -- I don't think she says I was deceived about how
15 much they could charge me maximum. I don't think she's
16 saying that I didn't understand the wholesale price kept
17 going up like that, that my price would not go up or would
18 not be higher than that, or is not capped. She's not
19 arguing there's a cap on the price. She's saying there's
20 no relationship, that she understood there was going to
21 be, between the orange line and the green line.

22 MR. SMITH: Okay.

23 THE COURT: And so, what she's saying is look
24 what happens. When the orange line goes up, the green
25 line goes up, and when the orange line goes down, the

1 green line stays flat. That's her argument.

2 MR. SMITH: Not when Ms. Gruber was our
3 customer.

4 THE COURT: But I'll ask Mr. Izard about that.
5 Assuming we have an appropriate plaintiff, why does that
6 not state a cause of action?

7 MR. SMITH: That might, Your Honor. I'd have to
8 see the complaint, but the complaint that we have before
9 us and the facts as to Ms. Gruber don't.

10 THE COURT: Well, okay. Let's take the class
11 allegations, all right? She's saying the class was
12 treated improperly this way. Your argument is she's not
13 an appropriate representative of the class.

14 MR. SMITH: Well, I'm arguing she wasn't
15 deceived because her rate didn't -- it had no connection
16 whatever to the alleged deception she alleges. Her rates
17 went up when the market rates, that they have described,
18 went up.

19 THE COURT: Right. That's what you're saying.
20 Outside the allegations of the complaint, you're saying
21 you have a defense to her as a representative for that
22 reason. I understand that argument. My question to you
23 is, this chart is in the complaint.

24 MR. SMITH: Okay.

25 THE COURT: This chart is talking about what

1 happened to the class. If they have the correct
2 representative, why does the allegations of the complaint
3 related to this lack of relationship between the wholesale
4 price and the Starion price, why does that not state a
5 cause of action?

6 MR. SMITH: Well, one, because the wholesale
7 price, the complaint doesn't give you any detail about the
8 wholesale price and what it comes from or what it means.
9 She just came up with this wholesale price. She doesn't
10 tell you where it comes from.

11 THE COURT: So you prove it wrong on the merits.
12 The problem is, accepting it as true as I have to do at
13 this point --

14 MR. SMITH: Unless it's speculative --

15 THE COURT: This is true. Let's start with
16 that. I have to consider it true. That's what I'm
17 required to do.

18 MR. SMITH: Unless it's --

19 THE COURT: So, for purposes of this argument,
20 you have to consider it true. Now that it's true, why
21 does it fail to state a cause of action?

22 MR. SMITH: Well --

23 THE COURT: It's true.

24 MR. SMITH: It fails to state a cause of action
25 because it's not based on any reality. It's speculative.

1 THE COURT: Because it's not true. That's what
2 you're saying.

3 MR. SMITH: It's speculative. It's not --

4 THE COURT: So you'll be able to prove it false.
5 That's what you're saying. But that doesn't help you
6 today.

7 MR. SMITH: They don't get to make up facts.

8 THE COURT: They do get to make up facts.
9 That's the thing. It's an allegation. It could be true,
10 it could be false; it's an allegation. They are alleging
11 that these facts are true and today I have to consider
12 them true. And you do, too. You don't win this motion
13 unless you can show that, even though these facts are
14 true, there's no cause of action. That's why we're here
15 today.

16 MR. SMITH: All right. My point was I don't
17 know that the Court has to accept speculation and it's
18 well-pled facts. I don't know that --

19 THE COURT: It's well-pled --

20 MR. SMITH: -- the wholesale rate is well-pled
21 facts when it doesn't actually relate to any prices that
22 anybody ever paid.

23 THE COURT: You're talking about the merits now.
24 They allege that there was exactly what the prices were.
25 That's either correct or it's not correct. It's either

1 true or it's false. I have to consider it true.

2 MR. SMITH: But they also note that there are
3 other costs associated with supplying electricity to an
4 individual customer.

5 THE COURT: Fair enough. So you'll have a good
6 defense on the merits.

7 MR. SMITH: They also make an allegation about
8 marketing materials but yet, there's no reference
9 whatsoever to what marketing materials this plaintiff ever
10 relied upon in coming to a decision to sign up with
11 Starion.

12 THE COURT: Right.

13 MR. SMITH: So I don't know what marketing
14 materials they refer to that, how we defend a complaint
15 that alleges that there's a reliance upon marketing
16 materials when we don't know. And the complaint itself is
17 pleading the wrong contract. The complaint quotes
18 language of the contract but it's not the right contract,
19 so --

20 THE COURT: You know, this will not be the first
21 time that somebody's cited the wrong contract in a cause
22 of action. I mean --

23 MR. SMITH: All right.

24 The plaintiff brings a claim under the
25 Massachusetts Consumer Protection Act without a

1 Massachusetts plaintiff. The plaintiff is a Connecticut
2 resident. Starion is a Connecticut company. So we've
3 asked to dismiss the Massachusetts claim absent a
4 Massachusetts plaintiff. We were told some months ago one
5 would be forthcoming but we haven't seen one yet.

6 THE COURT: Right.

7 MR. SMITH: And as to their good faith and fair
8 dealing, it's tied to the rate that goes up, it doesn't go
9 down, and I think that the plaintiffs needs to plead with
10 more specificity as to what happened to Ms. Gruber and
11 what her rates were in order to make out that allegation,
12 because right now you can't say that Ms. Gruber's rates
13 went up and didn't come down because there's no actual
14 allegation that Ms. Gruber's rates went up and stayed up
15 and should have gone down specifically to her as opposed
16 to the class.

17 THE COURT: Okay.

18 MR. SMITH: And the unjust enrichment, no one
19 disputes there's a contract that governs the relationship
20 between the parties.

21 THE COURT: Right.

22 MR. SMITH: That contract, the terms of that
23 contract are what this case are all about, and unjust
24 enrichment, you can't have an unjust enrichment claim when
25 you have a binding, enforceable contract. So the unjust

1 enrichment claim should be dismissed.

2 The good faith claim should be dismissed for
3 lack of specificity as to how we committed bad faith as to
4 Ms. Gruber, and I submit that certainly the Massachusetts
5 claim should be dismissed.

6 But also, the Connecticut unfair trade practices
7 claim, again, it doesn't make any specific allegations as
8 to how we treated Ms. Gruber unfairly, and I think they
9 have to first plead that with specificity as to how that
10 applied to her, how we overcharged her, and there was no
11 specificity in the contract as to that.

12 I think that should also be dismissed without
13 prejudice, subject to a complaint that includes the
14 specificity to tell us what it is that Ms. Gruber is
15 alleging, which I don't know how they could avoid
16 attaching the proper contract and, you know, the true
17 nature of Ms. Gruber's bills if they are going to allege
18 that she was overbilled. So, thank you.

19 THE COURT: All right, thank you. Let me hear
20 from Mr. Izard.

21 MR. IZARD: Thank you, Your Honor. As to the
22 contract terms, there's another document that counsel
23 didn't mention which is a file document called a
24 disclosure statement which is referenced in paragraph 24
25 of our complaint. And so, while the contract, this

1 variable pricing methodology language is vague, in fact, I
2 think if that's all the defendant has, I think there could
3 be a violation of CUTPA because CUTPA says that the
4 contract has to describe the terms pursuant to which a
5 rate would move. But I think --

6 THE COURT: Yes, I think paragraph 25 is what --

7 MR. IZARD: I'm sorry, Your Honor.

8 THE COURT: Is that right? "Your variable price
9 shall reflect the cost of electricity obtained from all
10 sources."

11 MR. IZARD: But, you know, counsel didn't attach
12 to their various filings a disclosure statement, and I
13 printed out one from 2013 that says "Variable price shall
14 be calculated monthly and shall reflect the cost of
15 electricity obtained from all sources," blah blah blah.
16 So those two documents kind of work together.

17 The other thing that I think is significant --

18 THE COURT: So, just to be clear, is the
19 disclosure statement the so-called marketing materials
20 you're relying on, or are you relying on some other --

21 MR. IZARD: We're not relying on anything else,
22 the disclosure statement and the contract.

23 But the other thing I think is important is the
24 Exhibit D the defendant filed, the document 30-5 which is
25 basically an electronic transcript the law requires, that

1 you have these electronic Q and A things with the
2 customer.

3 And that document, and this is directly with Ms.
4 Gruber, states that you are enrolling in Starion, is
5 simple, our monthly variable rate program, that may change
6 based on market conditions, with a current rate of 7.37
7 cents.

8 So this is the communication directly from
9 Starion to the defendants. It's not a person but it's an
10 electronic communication. And it says also says that you
11 can cancel upon 30 days written notice to Starion so it's
12 not like you can just call up and cancel any time you
13 want.

14 So it's pretty clear with Ms. Gruber we are tied
15 to market conditions based on the documents that the
16 defendant, either filed with the Court or --

17 THE COURT: Fair enough. Mr. Smith argues
18 though she pulled out before the rate went down and,
19 therefore --

20 MR. IZARD: Yes, Your Honor, and we disagree
21 with that because we think her rate was too high going up
22 because the rate going up wasn't tied to market
23 conditions.

24 It's interesting, in some of these cases people
25 say we're going to give you a fixed teaser rate for a

1 couple months, and if you look at that, it's like seven
2 cents and change. Starion didn't say that. Starion said
3 the seven-cent rate was tied to market conditions, and
4 it's basically the rate that is the lowest rate on their
5 chart.

6 But if you look at Ms. Gruber's bills, and I
7 understand they're outside the complaint, just to give you
8 information on this, her bills start ratcheting up very
9 quickly, even though the market rates aren't moving up at
10 all.

11 THE COURT: And where do you allege that in the
12 complaint?

13 MR. IZARD: We don't allege it in the complaint,
14 Your Honor, I'm responding to the questions.

15 THE COURT: All right, but I'm just -- it's got
16 to be in the complaint.

17 MR. IZARD: Well, I think what we allege in the
18 complaint is, you know, Ms. Gruber paid too high a rate,
19 that it was -- there was a representation that the rate
20 would move based upon market conditions and it didn't and
21 she paid too much.

22 If I could -- we could certainly amend to allege
23 that, but I think that we cover it.

24 THE COURT: Well, I think you need to amend
25 anyway, so why don't you include that in your amendment.

1 I think you probably do need a Massachusetts plaintiff and
2 unless it's clear that you can allege that Ms. Gruber
3 suffered some harm, then I think you probably need another
4 Connecticut plaintiff as well.

5 MR. IZARD: Well, we can allege that Ms. Gruber
6 suffered harm. We can do that.

7 On the issue of the Massachusetts plaintiff, I
8 guess I would like to address that. It hasn't been as
9 well briefed as I think it might have been because the
10 defendant raised it in a footnote, we gave a similar
11 response and then there was something in the reply but --
12 you know, there's, the issue really flows from the Supreme
13 Court's decision in Ortiz v. Fiberboard which talks about
14 the timing of considering standing as opposed to class
15 certification.

16 And the Court there says that class
17 certification should be considered first if it's logically
18 antecedent, and there's a lot of discussions in Newburg on
19 this, Chapters 2.1, 2.2 and 2.6, but at least the cases in
20 the 2nd Circuit say that the consensus is that you look at
21 the class certification issue and that a plaintiff in one
22 state may, on a consumer fraud type theory, represent
23 plaintiffs in other states if the requirements of Rule 23
24 are met.

25 And the reason is that standing relates to

1 injury in fact. It doesn't talk about injury in law. It
2 talks about injury in fact.

3 Now, we have alleged, and we will allege with
4 under detail, that Ms. Gruber suffered an injury in fact
5 because she was harmed because she was basically charged
6 improperly in the market.

7 We have alleged in Massachusetts we've got the
8 same market, we've got the same type of injury, we've got
9 the same type of contract, so the injury in fact for
10 Massachusetts people is the same as the injury in fact for
11 Connecticut people.

12 And then we move into a Rule 23 predominant type
13 of analysis to see if the laws are sufficiently similar so
14 that it would be appropriate under Rule 23 to allow a
15 Connecticut plaintiff to do that.

16 And, if I might, in our brief we mention Judge
17 Hall's case where she had a nationwide class, but I would
18 just like to mention a couple of additional cases from the
19 Southern District where Courts talk about how this is
20 handled in the consumer fraud case and other cases and
21 what the consensus is.

22 One is In Re: Digital Antitrust Litigation, 812
23 F.Supp 2d 390, which is Chief Judge Preska's opinion.

24 Another is D/b/a DP, Indirect Purchaser
25 Antitrust Litigation, 903 FSupp 198. That's Judge Sebol.

1 And then Winfield v. Citibank, which is not a
2 consumer fraud case, but it's 842 FSupp 2d 560, Judge Poe.

3 And I think what these cases say, relying on the
4 Supreme Court's decision in Ortiz and the principles that
5 are discussed in Newburg, that, you know, you look at this
6 under Rule 23, once the plaintiff, him or herself, has
7 actually established individual standing -- because this
8 is a constitutional standing, it's not some kind of
9 statutory standing so it's an injury in fact analysis. So
10 I just want to make that point because I think the
11 briefing was probably not as complete as it could be based
12 on the sequencing.

13 I don't know if the Court has any other
14 questions or --

15 THE COURT: How does your unjust enrichment
16 claim survive?

17 MR. IZARD: I'm sorry --

18 THE COURT: How does your unjust enrichment
19 claim survive?

20 MR. IZARD: I think the analysis of unjust
21 enrichment is the same as it was in Viridian, and to the
22 extent that there is a contract that would be covered by
23 the implied covenant, I think then the unjust enrichment
24 claim would fall away.

25 So I would urge the Court to basically issue the

1 same order that it entered in Viridian. I don't see any
2 difference between the two cases on that point.

3 THE COURT: All right. So just to be clear,
4 you're going to file an amended complaint. You're going
5 to give more detail about the actual injury to Gruber.
6 You're going to clarify that you're not relying on
7 marketing materials but, rather, on the disclosure
8 documents that you have just described, and with those
9 changes you think you survive.

10 MR. IZARD: Yes, Your Honor.

11 THE COURT: All right. Let me hear from
12 Mr. Smith.

13 MR. SMITH: First, Your Honor, as to the
14 disclosure statement, again, this is not a document that
15 applies to the plaintiff. It is not document that the
16 plaintiff got, you know, so as --

17 THE COURT: Well, presumably she's either going
18 to be able to allege that she received it or she's not
19 going to be able to allege that she received it.

20 MR. SMITH: Okay.

21 THE COURT: So we'll know that next round.

22 MR. SMITH: Okay. We'll see how that comes out.

23 As to standing, it's just, it's not the law of
24 the 2nd Circuit, it's not the current law of the district
25 courts within the 2nd Circuit. The cases cited by

1 plaintiff in footnote 17, and the Blessing case cited on
2 page 20 of the plaintiff's responsive brief, it wasn't an
3 antitrust case. The Abbott Laboratories case in footnote
4 17 is an antitrust case.

5 Here's an interesting one. The Static Random
6 Access Memory case, actually certified the case as to 27
7 specific statewide class actions, was an MDL, because
8 there were 27, plaintiffs from 27 states, so the case that
9 they cite is, highlights the actual fact that you can't
10 have a class that is, on a consumer case, that is for
11 other states consumer laws without having a plaintiff from
12 that case.

13 In some of the recent cases, Jorgeson v. Felix
14 Storage, Inc. from the Southern District of New York in
15 2012, in a motion to dismiss, says the consumer product
16 claims are only allowed in states where the named
17 plaintiffs reside. And that is at Westlaw, cite 212
18 Westlaw 2354247.

19 Also cited in our brief, the HSP Bank Debit Card
20 Overdraft Fee Litigation where a plaintiff does not have
21 standing to bring consumer claims for states where no
22 named plaintiff resides, also on a motion to dismiss.

23 The 2nd Circuit in the Debra Mahan case says
24 that the Court can decide standing and should decide
25 standing before class certification. That's also cited in

1 our brief, and that is Mahon, M-a-h-o-n, v. Ticore Title
2 Insurance Company, 683 F3d 59.

3 So this is absolutely appropriate for the Court
4 to decide now. If they have a Massachusetts plaintiff, a
5 Massachusetts plaintiff, they think that they can use to
6 bring a Massachusetts claim, they should have that
7 plaintiff; otherwise the Massachusetts claim should be
8 dismissed.

9 And as to -- the plaintiff had mentioned the
10 rates, since she pulled out, the rates went down, in
11 response to Your Honor's question about my argument, that
12 I would reiterate as to Ms. Gruber, there are insufficient
13 facts to, even to plead a claim, let alone to state a
14 Connecticut Unfair Trade Practices claim sufficient to
15 survive a 9(b). I think that's the main issues --

16 THE COURT: Well, he's going to replead with
17 respect to her. Do you dispute that if he pleads that her
18 rates, as they were increased, were increased faster than
19 they should have been, based upon the experience in the
20 wholesale market, does that state a claim?

21 In other words, you seem to, you seem to be
22 arguing that she didn't have standing because she pulled
23 out before the wholesale market rate went down and,
24 therefore, she never had the experience of her rate not
25 going down, but if it went up higher, if it went up faster

1 than it should have, based upon the experience in the
2 wholesale electric market, why wouldn't that state a
3 claim?

4 MR. SMITH: I'll have to see what they plead
5 but, Your Honor, the market conditions for any of these
6 defendants, it's not -- there isn't a direct correlation
7 for some of the rates, because when there's bad weather
8 and the rate goes up to a dollar-fifty a kilowatt hour,
9 that doesn't get passed onto the customer, a dollar-fifty
10 a kilowatt hour. That gets spread out over a period of
11 time.

12 So if the rate went up in preparation for winter
13 and stayed up a little bit after winter, that's because
14 the defendant, electric suppliers were spreading that
15 loss, spreading those costs over a larger period of time
16 so they didn't have to stick a customer with, you know, a
17 bill that was charging, you know, 40 cents, 50 cents, 60
18 cents a kilowatt hour, because on certain days the rate
19 was a dollar-fifty a kilowatt hour.

20 Weather conditions, especially the weather we
21 had in this past winter and the winter before that, have a
22 tremendous effect on the price. And if the defendants
23 make a business decision to spread that cost along, they
24 want to say the wholesale rate is this, well, in reality
25 it's the wholesale price plus all the other costs, and

1 there are lot of costs that are associated that are
2 actually costs of electricity, not the wholesale cost.

3 For example, ancillary costs --

4 THE COURT: Right.

5 MR. SMITH: -- these are not, these are not
6 costs -- we're not even talking about overhead cost, we're
7 talking about actual cost that the electricity to charge
8 is not the actual what they call the wholesale rate.

9 THE COURT: Including energy, capacity,
10 settlement and ancillaries, related transition and
11 distribution charges and other related charges, taxes --

12 MR. SMITH: Ancillary charge is a charge that
13 the ISOs charge that basically keep the generation plants
14 that aren't at full capacity, you know, there and ready
15 and then there's a, you know, icap charge and installed
16 capacity -- basically you're paying for people to be on
17 standby to crank up a generator when that's needed because
18 there needs to be enough electricity in the grid to meet
19 everybody's needs at that exact moment. So it's a gentle
20 balancing of making sure that there's exactly that much in
21 there.

22 There's also renewable energy credits.
23 Connecticut requires something like 18 percent of our
24 energy be from renewable energy sources.

25 THE COURT: Right.

1 MR. SMITH: So we have renewable energy credits.
2 All of that is the actual cost of electricity.

3 THE COURT: And all that is merits-based.

4 MR. SMITH: But if you're going to say that the,
5 you know, her rate went up a little more than the
6 wholesale rate was going up in preparation for the winter,
7 well --

8 THE COURT: I don't think he said in preparation
9 for winter. He -- I think the claim is her rate went up
10 faster than it should have based on the cost of
11 electricity. Now, that's either a true statement or a
12 false statement, but the question whether it's true or
13 false is for another day. The question for today, if
14 that's the allegation, why doesn't that state a cause of
15 action? It could be false.

16 MR. SMITH: Well, I have to see the words they
17 use to plead that and, you know, now that they have all
18 our financial information for them to plead that within
19 their obligations of Rule 11 when they know the reality of
20 the actual pricing, I'll have to see how they come up with
21 the new allegations they are going to plead as to how that
22 happened with Ms. Gruber, because, you know, they had
23 information to assess all the other costs that are in that
24 purchase of electricity and overhead costs so we'll see
25 what they come up with to do that.

1 Can they never -- you know, do I think they can
2 never state a claim? They could, you know, but under the
3 facts as they exist and the information they have now
4 available to them, I'll have to see how they come up with
5 a pleading that dances around all that.

6 THE COURT: Okay, all right. Thank you.

7 I'm going to rule on the motion to dismiss at
8 this time. And in doing that, as I've made clear, I have
9 to accept the allegations of the complaint as true, draw
10 all reasonable inferences in favor of the plaintiff and
11 decide, looking at the complaint in that light, whether it
12 states a plausible claim for relief.

13 And the bottom line is the unjust claim is
14 dismissed without prejudice only to the extent that if
15 there is a holding that the contract is illusory, it can
16 be replead; otherwise it's not a legitimate alternative
17 claim.

18 The plaintiff is going to be required to
19 replead. We need more detail regarding Ms. Gruber's, the
20 basis for alleging that Ms. Gruber has standing. Ideally
21 the complaint would be amended to include a Massachusetts
22 plaintiff.

23 I'm going to deny without prejudice the claim
24 that there needs to be a Massachusetts plaintiff because,
25 frankly, I haven't fully considered that at this point and

1 it may be mooted in the event that we have a Massachusetts
2 plaintiff, so rather than hold that one issue, I'm going
3 to deny that motion without prejudice.

4 Obviously the motion to dismiss in general is
5 dismissed without prejudice, but it appears to me if more
6 detail is added that the complaint does state a cause of
7 action. Again, it may well be one that cannot be proven,
8 but that's for a different day.

9 I don't intend to write and I hope both of you
10 understand the basis for this ruling. If you don't, I'm
11 happy to try and provide it now, but I don't intend to
12 write anything on it.

13 We're going to get an amended complaint. How
14 much time do you need, Mr. Izard?

15 MR. IZARD: I think the last week was 45 days,
16 if that's consistent, that's good with me.

17 THE COURT: Okay, that's fine. If you could
18 make it clear that you're not relying on marketing
19 materials, that you're -- spell out what you're relying
20 on. 9(b) is satisfied if you identify particular
21 documents. It's not satisfied when you just use a general
22 term, marketing materials.

23 MR. IZARD: Right.

24 THE COURT: Right. Okay. Any other questions
25 or concerns about that ruling?

1 MR. IZARD: No, Your Honor.

2 MR. SMITH: No, Your Honor.

3 THE COURT: All right. 45 days to replead and
4 we'll go from there.

5 Where do things stand at this point in this
6 case?

7 MR. IZARD: We have served discovery requests on
8 the defendants. We've gotten some responses.

9 Unfortunately Mr. Klein's been handling that and
10 he's been under the weather, but I think the two big
11 issues concern whether we would, discovery should be
12 limited to Connecticut or whether it would also include
13 Massachusetts, and also whether discovery would include
14 the period of before and after Ms. Gruber was a customer.
15 So I think it -- all those are the big issues. We're
16 happy to replead before we get into those issues, if the
17 Court prefers, but we obviously don't want to get too far
18 off-track because there has been a scheduling order
19 entered in the case and we obviously can't afford to use
20 up too much time without moving forward.

21 THE COURT: Do you want to be heard on that, the
22 scope of discovery?

23 MR. SMITH: The Massachusetts one, for obvious
24 reasons that we talked about here, and what we said to
25 plaintiff's counsel, present counsel, was that in order,

1 before we go down a long road of hundreds of thousands of
2 dollars in discovery, all of which will potentially be a
3 billed cost if we're successful, we'll give you, in terms
4 of, you know, under the protective order and the terms,
5 fostering a settlement and the interchange of the actual
6 situation are audit financial statements and are profit
7 loss statements for 2013 and 2014 that show the 5.52
8 percent net profit pretax for 2013 and a 9.89 net profit
9 pretax for 2014. I don't think that we would be gouging
10 if that's the profit we're making, but that's for another
11 day, but I've given them that information. I've told them
12 that they have specific line items of backup they need.
13 We can try and get that but let's focus on that before we
14 go and spend hundreds of thousands of dollars on discovery
15 to see whether or not what they thought occurred here they
16 still believe occurred here.

17 So that was the conversation I had with
18 plaintiff's counsel, and I provided those audit financial
19 statements and profit and loss statements and whatever
20 they request for specific information, we can address that
21 on a line item by line item, but it makes sense to work
22 along that line and defer and see what we get in an
23 amended complaint.

24 THE COURT: Yeah, okay. My initial reaction is
25 that the discovery, to the extent it proceeds, should

1 cover the class period, but at this point should not cover
2 Massachusetts.

3 So that let's figure out, either we're going to
4 get a Massachusetts plaintiff or there's going to be a
5 ruling that you're permitted to bring this claim. But if
6 not, it's just going to be a waste of time. But the class
7 period, I don't think there can really be a problem.

8 MR. SMITH: Your Honor, we're making an offer to
9 them to give them the information that we think they need
10 to fully evaluate the situation, and what the -- whether
11 there was actual gouging here and our audited financial
12 statements should show them that.

13 It was an offer to them to try and save costs,
14 so if we go down another road and are before Your Honor on
15 a bill of cost or some other motion, that we all remember
16 that offer was made to try and limit the costs and try to
17 focus on that period as the plaintiff so we could see if
18 we could head this off. And so that's why the offer was
19 made and we hope that will be heeded.

20 MR. IZARD: Your Honor, we're happy to talk
21 during this 45 period. I'm obviously not interested in
22 pursuing a case that doesn't make sense. I don't, I did
23 take a quick look at it this morning so I disagree with
24 their metrics on how to calculate profitability but I want
25 to review it with our expert before I go too far down the

1 road.

2 So we're happy to talk and we're not here to
3 waste anyone's time. I'm sure that will happen in the
4 next 45 days.

5 THE COURT: All right, thank you.

6 MR. SMITH: Thank you, Your Honor.

7 THE COURT: All right, thank you. We'll stand
8 in recess.

9 (Whereupon the above matter was adjourned at
10 12:00 o'clock, noon.)
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C E R T I F I C A T E

I, Susan E. Catucci, RMR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/ Susan E. Catucci

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